

The Appeals Board has reviewed the preliminary hearing record, the medical records included therein, and the briefs of the parties. The Appeals Board finds that the single issue raised by the respondent is a jurisdictional issue that grants Appeals Board authority to review the preliminary hearing order. See K.S.A. 44-534a, as amended. The Administrative Law Judge granted claimant's request for a C6-7 anterior cervical

discectomy and fusion with Glenn Amundson, M.D., of the Kansas University Surgery Association. For the reasons set forth below, the Appeals Board affirms the Administrative Law Judge's order.

Claimant was injured while performing typing duties for the respondent in September of 1995. That injury was admitted by the respondent and medical treatment was provided with Dr. Gary Baker, a plastic surgeon located in Kansas City, Missouri. Dr. Baker diagnosed claimant with an overuse injury to the right upper extremity. Dr. Baker treated claimant conservatively with physical therapy. At the conclusion of the treatment, Dr. Baker ordered claimant to undergo a functional capacity evaluation on February 23, 1996, to aid him in assessing claimant's functional impairment.

Prior to this work-related injury, claimant had been involved in two automobile accidents in 1987 and a subsequent accident in 1992. The automobile accidents caused injury to claimant's cervical neck area with a 1987 MRI indicating a bulging disc at the C6-7 level. Following those car accidents, claimant's family physician, Steven E. Buie, M.D., restricted claimant's activities to no lifting over five pounds, no pushing or pulling, no full extension of neck, and no overhead lifting. Claimant testified she had tried to comply with those restrictions over the years and had done so the majority of the time. Claimant testified she generally remained asymptomatic except when she was stressed or when she exceeded the restrictions. However, claimant testified that during the functional capacity evaluation test prescribed by Dr. Baker she was required to perform movements that made her neck symptomatic. Claimant alleged her neck pain changed from an occasional problem to a daily problem. In order to manage her pain after the testing, claimant was required to take over-the-counter medication while she was working and to take prescription pain medication at night.

In an effort to relieve those increased symptoms, claimant first sought medical treatment on her own. However, respondent's insurance carrier finally referred her on May 21, 1996, to Dr. Glenn Martin Amundson, a board-certified orthopedic surgeon, located at the Kansas University Surgery Association. Dr. Amundson diagnosed degenerative disc disease with referred axial pain aggravated by the overhead position and extension that claimant was required to perform during the functional capacity evaluation. An MRI was performed at Dr. Amundson's direction on May 30, 1996. The MRI showed a central herniated disc at C6-7, with narrowing. In preparation for surgery, Dr. Amundson on June 10, 1996, performed a discography that produced a concordant pain response which was refractory to conservative therapy. At that time, the doctor also scheduled claimant for a C6-7 anterior cervical discectomy and fusion on June 12, 1996. However, respondent's insurance carrier would not authorize the surgery and the surgery was postponed.

Respondent subsequently requested a second opinion in regard to claimant's cervical neck condition from Chris J. Maeda, M.D., an orthopedic surgeon located in Kansas City, Missouri. Dr. Maeda examined claimant on July 25, 1996, and confirmed

claimant had a disc protrusion at C6-7 dating back to 1987. The doctor opined the anatomic location and size of the disc protrusion had not changed over the years. Nevertheless, Dr. Maeda did conclude that claimant's symptoms had become worse as a result of the functional capacity evaluation testing in February 1996. The doctor recommended that claimant continue with her conservative treatment and not to have surgical intervention at that time.

Respondent argued claimant did not suffer additional personal injury on February 23, 1996, during the functional capacity evaluation because the previous MRIs taken in 1987 and 1988 showed no change in claimant's cervical disc protrusion when compared to the recent MRI taken on May 30, 1996. Respondent also argued that the risk of injury complained of by the claimant was personal to her and not a risk of her employment with the respondent. Therefore, respondent concluded the claimant's cervical injury did not arise out of and in the course of her employment with respondent.

The Appeals Board finds for preliminary hearing purposes, that the preliminary hearing record composed of claimant's testimony and medical records admitted by the parties established claimant had a preexisting cervical injury caused by prior automobile accidents. However, the overall preliminary hearing record also established that the claimant, prior to the functional capacity evaluation test in February 1996, was able to manage that condition and it remained relatively asymptomatic. Additionally, the preliminary hearing record as a whole proved the activities claimant had to perform during the functional capacity evaluation aggravated her preexisting cervical condition and made it symptomatic. When an injured employee subsequently receives an additional injury during the treatment of his primary injury, the employer is also responsible for the subsequent injury. See Taylor v. Centex Construction Co., 191 Kan. 130, 379 P.2d 217 (1963). If a worker has a preexisting condition and the preexisting condition is aggravated, accelerated or intensified by a subsequent work accident, the injured worker is entitled to be fully compensated for the resulting disability. See Cox v. Ulysses Cooperative Oil & Supply Co., 218 Kan. 428, 544 P.2d 363 (1975). In the case at hand, claimant had a preexisting cervical condition aggravated during a functional capacity evaluation performed while she was being treated for a separate right upper extremity work-related injury. Accordingly, the Appeals Board concludes that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler that ordered the cervical surgery recommended by Dr. Amundson to be performed on September 20, 1996, should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler dated September 3, 1996, should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

c: Kathleen A. McNamara, Kansas City, MO
Gregory D. Worth, Lenexa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director